STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL D. BEASLEY,

Defendant-Appellant.

UNPUBLISHED
March 10, 2000

No. 204922
Recorder's Court
LC No. 96-503595

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions and sentences for first-degree murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony [felony-firearm], MCL 750.227b; MSA 28.424(2). We affirm defendant's convictions but remand for modification of his sentence.

I.

Defendant first claims that the admission of evidence that the police seized several types of ammunition at defendant's residence constituted bad acts evidence which violated MRE 404(b) and denied him his right to a fair trial because it showed that defendant was involved in a separate criminal transaction, i.e., possession of several different illegal weapons, unrelated to the instant case, and it served only to prove that he acted in conformity with the character underlying the separate offenses. We disagree.

We first note that, contrary to defendant's assertion otherwise, a plea of not guilty presumptively puts all elements of an offense at issue and does not prevent the prosecutor from introducing other acts evidence at trial. *People v VanderVliet,* 444 Mich 52, 65, 78; 508 NW2d 114 (1993).

We next note that defendant did not object below to the admission of the testimony challenged here. Consequently this issue is forfeited unless defendant demonstrates that a plain error occurred which affected his substantial rights, i.e., that the error affected the outcome of the proceedings. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant,* 445 Mich 535; 520

NW2d 123 (1994). If these requirements are met, we then exercise our discretion in deciding whether to reverse, which is warranted only when the plain, forfeited error results in the conviction of an actually innocent defendant, or when an error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id.*

It cannot be said that the trial court committed plain error in admitting the testimony challenged here. Evidence of the ammunition found at defendant's residence was relevant and admissible as a link in helping to establish defendant's possession of the shotgun found near the scene of the murder and his identity as the gunman who murdered the victim. MRE 401, 402. See *People v Hall*, 433 Mich 573, 580-584; 447 NW2d 580 (1989); *People v Rice (On Remand),* 235 Mich App 429, 441; 597 NW2d 843 (1999). Defendant has not cited to, and we are not aware of, any provision in the Criminal Code which prohibits the possession of ammunition. Nor has defendant demonstrated how the testimony in question put his character in issue or how it establishes a propensity to possess illegal weapons. The evidence offered was not unfairly prejudicial to defendant, and he is entitled to no relief on the basis claimed.

II.

Next, defendant claims the trial court abused its discretion in admitting a photograph of the victim. We conclude that defendant's claim is without merit.

The decision whether to admit or exclude photographs is within the discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 527 NW2d 909 (1995). Defendant's argument that the photograph at issue was irrelevant is without merit. The photograph, which depicted the nature and extent of the victim's injuries, was relevant to proving defendant's intent to kill and was relevant to establishing the credibility of the expert witness in showing how the injuries occurred. *Id*. at 71-73. Defendant's further arguments that the photograph should have been excluded because it was more prejudicial than probative and was merely cumulative to the medical examiner's testimony are equally unavailing. Defendant has not demonstrated that the photograph was anything but "accurate factual representations of the injuries suffered by [the victim] and the harm [defendant] caused." *Id*. at 77. The graphic nature of the photograph did not preclude its admission. *Id*. at 76, 78. Moreover, the photograph was not excludable simply because the medical examiner orally testified about the information contained in the photograph. *Id*. at 76. The photograph was admissible to corroborate that witness' testimony. *Id.*

III.

Third, defendant claims that he was denied a fair trial by the prosecutor's impeachment of defendant with evidence that he had been convicted of prior offenses involving automobile thefts specifically, a second conviction in 1986 for unlawfully driving away an automobile [UDAA] for which defendant was released from prison in 1986 and a second conviction UDAA in 1990. Generally, the admission of impeachment evidence by prior convictions is reviewed for an abuse of discretion. *People v Rice (On Remand),* 235 Mich App 429, 438; 597 NW2d 843 (1999). Here, however, defendant did not object to the admission of the impeachment evidence. Without objection, there can be no abuse of discretion. *Id*. at 439. Defendant has not established that the admission of the impeachment

evidence was a "plain error" which affected the outcome of the proceedings, and he has therefore forfeited review of this issue. *Carines, supra; Rice, supra.*

IV.

Defendant raises two instructional issues we conclude are without merit: (a) that the trial court failed to give a proper instruction to the jury on voluntary manslaughter, and (b) that the jury was not instructed to separately consider his guilt or innocence on each charge. Again, defendant failed to preserve these issues by objecting to the instructions below; therefore, he has waived the instructional issues unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993). See also *Carines, supra; Grant, supra*. We conclude that the instructions the trial court gave for voluntary manslaughter adequately set forth the elements of voluntary manslaughter and distinguished it from murder. CJI2d 16.8 and 16.9; *People v Pouncey,* 437 Mich 382, 388; 471 NW2d 346 (1991). After reviewing the trial court's instructions in their entirety, *People v Daniel,* 207 Mich App 47, 53; 523 NW2d 830 (1994), we also conclude that the trial court's instructions to the jury adequately protected defendant's right to have the jury separately consider his guilt or innocence on each charge. The trial court committed no error in its instructions to the jury.

V.

Defendant next contends that the prosecutor engaged in prosecutorial misconduct. Again, however, defendant did not object to the conduct below; therefore, he forfeits this claim unless he shows that our failure to review the conduct at issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant has not made such a showing.

Even when the merits of defendant's argument are considered, we conclude that the prosecutor did not engage in prosecutorial misconduct. When the prosecutor's remarks during voir dire are reviewed in context, *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995), it is clear that the prosecutor was merely attempting to determine that the jurors could be fair to *both* sides at trial, would not be biased in favor of either, and would not hold the prosecutor to a higher burden of proof than was required. The remarks were entirely proper and did not prejudice the jurors against defendant in any way. The fact that during closing argument the prosecutor said "I believe" rather than "the evidence shows" does not in and of itself constitute error requiring reversal. *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). When the closing remarks are viewed in context, it is evident that the prosecutor was commenting on the evidence presented at trial and arguing that the strength of the evidence showed that defendant is guilty. This was a proper argument. *Id; Bahoda, supra* at 286-287. The prosecutor did not attempt to place the prestige of his office behind a contention that defendant is guilty. Finally, even if the prosecutor's complained of comment in rebuttal, standing alone, could be considered improper, it does not constitute a ground for reversal because it was responsive to defense counsel's argument in closing that the police failed to test defendant to determine whether he had fired a gun. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

VI.

Defendant next claims that it was error for the prosecutor to elicit evidence that defendant used an alias.

Again, defendant did not object to the error now claimed on appeal. Defendant has not shown that this evidence constituted "plain error" which affected his substantial rights, *Carines, supra*, and he is therefore entitled to no relief. See, e.g., *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996); *People v Bowens*, 119 Mich App 470, 472-473; 326 NW2d 406 (1982). As was the case in *People v Albert Thompson*, 101 Mich App 609; 300 NW2d 645 (1980), on which defendant relies on appeal, any error in the prosecutor's questions was harmless because the questions regarding an alias were few and not inflammatory.

VII.

Defendant contends that the trial court's denial of his motion for directed verdict was inadequate because the court failed to establish on the record its reasons for denial, failed to indicate if the evidence was viewed in a light most favorable to the prosecution, and failed to state whether the evidence was

sufficient to justify a reasonable man to conclude that all the elements of the crime had been established beyond a reasonable doubt.

Defendant neither objected to the trial court's ruling below nor asked the trial court to specify the basis of its ruling. Defendant is not entitled to relief from this Court because on appeal, as below, he has failed to identify the element(s) of the charged offenses for which the proofs were purportedly insufficient. Neither this Court nor the trial court should have to guess as to the basis for defendant's claim. The trial court's denial of defendant's motion was entirely sufficient and correct.

VIII.

Next, we address defendant's various sentencing issues. Defendant first asserts that his mandatory, nonparolable life sentence for first-degree murder violates Const 1963, art 4, § 45 because it is a determinate, rather than indeterminate, sentence. Defendant's claim is without merit. See *People v Cooper,* 236 Mich App 643, 660-664; 601 NW2d 409 (1999). Defendant's further claim that his life sentence without parole constitutes cruel and unusual punishment is likewise without merit. See *People v Hall,* 396 Mich 650; 242 NW2d 377 (1976); *People v Launsburry,* 217 Mich App 358, 363; 551 NW2d 460 (1996).

Defendant is correct, however, that the trial court erred in imposing consecutive sentences for defendant's convictions of first-degree murder and assault with intent to commit murder. Concurrent sentencing is the norm in this state. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). A consecutive sentence may be imposed only if specifically authorized by statute. *People v Chambers*, 430 Mich 217, 222; 421 NW2d 903 (1988). There is no statutory provision which authorizes the trial court to impose consecutive sentences for the sentences at issue. The lower court is to amend defendant's judgment of sentence *nunc pro tunc* to state that defendant's life sentence without parole for first-degree murder and his sentence of twenty to forty years' imprisonment for the assault conviction are to be served concurrent to each other but consecutively to the two-year sentence for felony-firearm. The lower court is to forward a corrected copy of defendant's judgment of sentence to the Department of Corrections.

IX.

Defendant's final claim, that the cumulative effect of combined errors violated his right to a fair trial, is without merit, and reversal of his conviction is not warranted on this basis. *Cooper*, *supra* at 660.

We affirm defendant's convictions and remand for modification of his sentence as previously specified. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey